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No. 04-108

In The
Supreme Court of the United States

SUSETTE KELO, et al.,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF OF LAW PROFESSORS ROBERT H. FREILICH, RICHARD BRIFFAULT, JULIE CHESLIK, JANICE C. GRIFFITH, TIM IGLESIAS, JULIAN CONRAD JUERGENSMAYER, ANITA MILLER, THOMAS E. ROBERTS, PATRICIA E. SALKIN, EDWARD J. SULLIVAN, ROBERT R. M. VERCHICK, JUDITH WELCH WEGNER, AND ALAN WEINSTEIN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICI[1]

A group of land use and property professors submitted a Brief Amicus Curiae in support of Petitioners. A separate group of land use and property professors are filing this counter brief to express their belief that the position of the prior brief, to wit, that in judicial review of public use under the Fifth Amendment the reviewing court must use intermediate scrutiny in lieu of rational basis, is erroneous, and that rational basis remains the appropriate level of scrutiny for determinations of public use in economic redevelopment matters.

The professors filing this brief in support of Respondents comprise the following:

Robert H. Freilich, Professor of Law, University of Missouri-Kansas City School of Law, national editor of THE URBAN LAWYER, the national quarterly journal on state and local government law of the American Bar Association;[2] Richard Briffault, Vice-Dean and Joseph P. Chamberlain Professor of Legislation, Columbia Law School; Julie Cheslik, Associate Professor of Law, University of Missouri at Kansas City; Janice C. Griffiths, Professor of Law, Georgia State University College of Law; Tim Iglesias, Associate Professor, University of San Francisco School of Law; Julian Conrad Juergensmayer,

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to the brief's preparation or submission.

[2] Professor Freilich and Professor Thomas E. Roberts, who joins this brief, are co-authors, with Professor David Callies, who authored the Law Professors' Amicus Brief in support of Petitioners, of Callies, Freilich & Roberts, Cases and Materials on Land Use. (4th Ed. West 2004).

Professor of Law, Georgia State University, and Professor of Law Emeritus, University of Florida; Anita Miller, Adjunct Professor, Department of Community and Regional Planning, and School of Law, University of New Mexico; Thomas E. Roberts, Professor of Law, Wake Forest School of Law; Patricia E. Salkin, Associate Dean and Professor of Law, and Director, Government Law Center for Albany Law School; Edward J. Sullivan, Adjunct Professor, Department of Urban Studies and Planning, Portland State University, and Adjunct Professor of Law, Lewis and Clark College; Robert R. M. Verchick, Gauthier-St. Martin Chair in Environmental Law, Loyola University, New Orleans; Judith Welch Wegner, Professor of Law, University of North Carolina at Chapel Hill; and Alan Weinstein, Professor of Law, Cleveland-Marshall College of Law and Maxine Goodman Levin College of Urban Affairs.

STATEMENT OF THE CASE

In an effort to reverse a devastating decline in population, abandonment, and a deteriorating economy due in major part to the region's shifting of resources to suburban sprawl, the City of New London, a "distressed municipality" of the State of Connecticut (the "City"), developed a comprehensive plan and implementation program to reverse the situation. In accordance with Chapter 132 of Connecticut statutes, the City commenced a municipal redevelopment project and granted initial approval to the preparation of a redevelopment plan. The New London Development Corporation (the "NLDC") prepared a multi-faceted plan, covering approximately 90 acres, which included commercial, retail, residential, tourist and recreational facilities. Fulfillment of this plan required the

acquisition of land by the NLDC. When certain property owners refused to sell their land, the NLDC utilized eminent domain to acquire hold-out properties in order to complete the project. Seven property owners in the development plan area ("Petitioners") challenged the City's actions, asserting that economic redevelopment and revitalization of the city was not a public use necessary to support condemnation under the Fifth Amendment, unless there was a finding of blight in the planned area subject to the condemnation. The Connecticut Supreme Court (the "Connecticut Court") determined that economic development was a "valid public use for the exercise of the eminent domain power" where the City's population and economy were severely distressed and major intervention by state and local government was required. *Kelo v. City of New London,* 843 A.2d 500, 528 (2004).

This Court granted certiorari. The Court has before it the issue of whether the Fifth Amendment "public use clause" per se prevents a city from acquiring private land through eminent domain in order to achieve the economic development and revitalization of a distressed community unless there is a concomitant finding of blight in the affected area.

SUMMARY OF THE ARGUMENT

This Court for over 100 years has reviewed cases under the Fifth Amendment public use takings clause[3] using the rational basis test, and this test remains, in our view, the appropriate test, especially for state and local

[3] " . . . nor shall private property be taken for public use without just compensation." U.S. CONST. Amend. V.

government legislative determinations to use condemnation to achieve the social and economic redevelopment and revitalization of a city. This Court has never used higher scrutiny for eminent domain or takings except in a limited range of cases involving unconstitutional conditions attached to development approval, and there is no reason to apply it to direct condemnation under the Fifth Amendment. In determining whether property may be acquired by condemnation for social and economic redevelopment and revitalization, the requisites of our Constitution are fully satisfied if a court evaluates whether the legislative determination supporting the condemnation is rational, and the legislative decision must be upheld unless it is patently arbitrary or lacks valid statutory authority. Intermediate scrutiny is highly inappropriate in our federalist form of government. This Amicus Brief urges this Court to reiterate its prior holdings, establishing that so long as:

(1) there is state statutory or home rule authority establishing the goals and means of achieving social and economic redevelopment and revitalization;

(2) the state or local government has utilized a comprehensive planning process and analysis assessing the goals and means; and

(3) the state or local government retains regulatory or contractual or ownership control over the project and a private redeveloper,

there is valid public use and purpose to meet the Fifth Amendment's rational basis review.

ARGUMENT

A. THE RATIONAL BASIS TEST IS THE APPROPRIATE STANDARD FOR JUDICIAL REVIEW OF CONDEMNATIONS FOR ECONOMIC REDEVELOPMENT AND REVITALIZATION.

For more than seventy-five years, this Court has used a broad reading of the Fifth Amendment public use clause. "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience . . . " *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923). In determining whether a public use exists, this Court has held that it should "regard with great respect the judgments of state courts upon what should be deemed public uses in any state." *Id.* at 706. In its decisions in 1954, *Berman v. Parker,* 348 U.S. 26, 32 (1954) and in 1984, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-41 (1984), applying the rational basis test to economic redevelopment, this Court cited with approval prior case holdings that rational basis deference to a legislature's "public use" determination is required until it is shown to involve an impossibility, *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), that "any departure" from such deference "has proved impracticable in other fields," *Ex rel. TVA v. Welch*, 327 U.S. 546, 552, and that such deference will not be removed unless "the use be palpably without reasonable foundation." *United States v. Gettysburg Electric R.R. Co.,* 160 U.S. 668, 680 (1896).

A court's review is limited to a determination of whether there is a rational basis for the condemnation: "as long as the condemning authorities were rational in their positions that some public purpose was served," condemnation would be upheld. *Nat'l R.R. Passenger Corp. v.*

Boston and Maine Corp., 503 U.S. 407, 422 (1992), citing *Midkiff*, 467 U.S. at 242-43 and *Berman*, 348 U.S. at 32-34. Particularly in fields of social and economic legislation, which underlie all efforts at economic redevelopment and revitalization, this Court, per Thomas, J., has recently reiterated and made clear that a challenger not only "has the burden to negative every conceivable basis" that might support legislative action but also that "a legislative choice is not subject to courtroom facts findings and may be based on *rational* speculation unsupported by evidence or empirical data." *Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added).

Arguments raised by Petitioners and some of the amici briefs supporting Petitioners, see, *e.g.* Briefs Amicus Curiae of Professors David L. Callies, et al.; The National Association of Home Builders and the National Association of Realtors; New London Landmarks, Inc. et al.; Cascade Policy Institute; New London R.R. Co., Inc.; and Robert Nigel Richards, et al., assert that a categorical *per se* rule should be established holding that the rational basis test is not appropriate when a court is reviewing the sufficiency of public use in an eminent domain case, and that an ill-defined intermediate scrutiny test should be used by this Court. The use of a higher level of review in eminent domain cases is not supported by any decision of this Court or by the overwhelming majority of state courts.[4]

[4] For a comprehensive review of all state decisions in this area up to and including the *Kelo* decision in the Connecticut Supreme Court, see, Robert H. Freilich and Robin A. Kramer, CONDEMNATION FOR ECONOMIC DEVELOPMENT VIOLATES PUBLIC USE CLAUSE: THE MICHIGAN SUPREME COURT OVERTURNS HISTORIC *POLETOWN* DECISION, 27 Zoning and Planning L. Rep. 1, No. 10, November 2004 (Thomson-West).

Instead, the trend has been to allow a narrow scope of judicial review of legislative decisions on eminent domain. See *Matter of Condemnation by Minneapolis Community Development Agency of Certain Lands in City of Minneapolis Situated in Development Dist. No. 57, South Nicollet Mall*, 582 N.W. 2d 596, 599 (Minn. Ct. App. 1998), *rev. denied*, finding that "the application of a higher level of scrutiny to review condemnation proceedings is out of touch with the national trend," citing 2A NICHOLS ON EMINENT DOMAIN, § 7.06 [24][c] at p. 7-242 (Matthew Bender rev. 3d ed. 1998) (citing cases). Thus, the recent decision by the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W. 2d 765 (Mich. 2004), which found that a condemnation was not for a public use and overturned *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455 (Mich. 1981), rejected *Poletown's* heightened scrutiny test. See, also, *City of Las Vegas v. Pappas*, 76 P.3d 1, 11 (Nev. 2003) ("so long as a redevelopment plan, or any individual redevelopment project, bears a rational relationship to the eradication of physical, social or economic blight, it serves a public purpose within the power of eminent domain."); *General Bldg. Contractors, L.L.C. Bd. of County Comm'rs of Shawnee County*, 66 P.3d 873 (Kan. 2003) (upholding county's ability to condemn property for industrial and economic development); *Town of Beloit v. County of Rock*, 657 N.W. 2d 344, 353 (Wis. 2003) ("it is a well-settled rule that the legislative body determines what constitutes a public purpose, and that courts will not interfere unless at first blush the act appears so obviously designed in all its principal parts to benefit private persons . . . ").

The "national trend" acknowledging that economic development is a valid public purpose and that judicial review of such purpose is "extremely narrow," *Berman* 348

U.S. at 32, began over 100 years ago. In *Chicago, Burlington & Quincy R.R. Co. v. Illinois,* 200 U.S. 561 (1906), this Court held that "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity," *Id.* at 592. In *United States v. Gettysburg Electric R.R. Co.,* 160 U.S. 668, 680 (1896), this Court stated "that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." In *Rindge Co.*, this Court stated that a state's determination of a public use should be approached "with great respect." 262 U.S. at 707.

The current scope of the public use clause and this Court's deference to the legislative purposes in its review of such cases was set forth in *Berman* and *Midkiff*. In *Berman,* this Court considered whether private property could be taken as part of an urban development project even though the specific property taken was not blighted. This Court held that the definition of the police power "is essentially the product of legislative determination addressed to the purposes of government . . . " and

> the legislature, not the judiciary, is the main guardian of the public needs to be served . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

348 U.S. at 32 (internal citations omitted).

Petitioners and their amici seriously misunderstand the holding in *Berman*. While the *Berman* court held that redressing area-wide blight in a redevelopment plan

satisfies the public use test, *Berman* did not hold that a finding of blight was required to utilize condemnation for redevelopment. This principle was firmly established in *Midkiff*, where this Court reiterated in affirming *Berman* that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241 (citations omitted). "The constitutional requirement is satisfied if the state legislature rationally could have believed the Act would promote its objective." *Id.* at 242 (citation omitted).

Any application of heightened scrutiny would be a serious departure from the Court's well-established principle limiting higher scrutiny to a narrow range of cases. "Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) (applying rational basis even to exclusion of a facility for mentally retarded persons). A higher level of scrutiny, either strict or intermediate, is only applied in an extraordinarily narrow range of cases, encompassing innate personal characteristics, including race, alienage, national origin, gender, legitimacy of birth, *Id.* at 440-441; and First Amendment issues relating to freedom of speech, see, *e.g. United States v. O'Brien,* 391 U.S. 367, 377 (1968), *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 703-04 (1986). Heightened, or higher level, scrutiny has not been applied to mental retardation, *Cleburne Living Center*, 473 U.S. at 442-443; poverty, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); or age, *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). The use of heightened scrutiny would mean that the courts were

making "substantive judgments about legislative decisions," *City of Cleburne,* 473 U.S. at 443, or effectively turn the courts into super-legislatures, to decide whether a use really benefited the public, or whether the particular project was the best way to achieve economic development, or even whether economic development is appropriate in the situation. See Phillip A. Talmadge, THE MYTH OF PROPERTY ABSOLUTISM AND MODERN GOVERNMENT: THE INTERACTION OF POLICE POWER AND PROPERTY RIGHTS, 275 Wash. L. Rev. 857 (2000). But this Court has held that it "do[es] not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting Inc. v. State of Mo.,* 342 U.S. 421, 423 (1952). See, also, *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978) (this Court does not "sit as a 'superlegislature to weigh the wisdom of legislation.'") (citations omitted). Separation of powers and federalism preclude the federal courts from such interference in what are clearly state legislative decisions. As long as the courts exercise judicial review over irrational legislative decisions, no higher scrutiny is needed.

Moreover, judicial restraint by this Court has worked well. State courts acting under their own state constitutions as well as the Fifth Amendment have utilized rational basis to overturn a number of state and local government condemnations in recent years. See Freilich and Kramer, at pps. 3-5, listing 20 cases since 1978, most of them since 2000 (17 cases), overturning condemnations on rational basis consideration. Why should this Court overturn a system of review that is working well? This Court has stated that state courts are at liberty to be more expansive in interpreting their own state constitutional

provisions. *Prune Yard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980). Going back to the period from *Berman v. Parker* (1954) until *Midkiff* (1984), one commentator found that an astonishingly high 15% of state cases reviewing public purpose under rational basis have rejected plans for lack of public use. Thomas Merrill, THE ECONOMICS OF PUBLIC USE, 72 Cornell L. Rev. 61 (1986).

In *Cleburne Living Center,* this Court discussed that higher scrutiny was appropriate where the classification is based on some characteristic which can not be related to the achievement of a legitimate state interest. Higher scrutiny is not appropriate where continued legislative response on a subject evidences state concern and review of a subject, and "belies" the "need for more intensive oversight by the judiciary." 473 U.S. at 443. "Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Lawrence v. Texas,* 539 U.S. 558, 579 (2003) (citations omitted) (O'Connor, J. concurring).

Although some commentators have asserted the need for heightened scrutiny in eminent domain cases when evaluating a public use, see, *e.g.* Pritchett, THE PUBLIC MENACE OF BLIGHT: URBAN RENEWAL AND THE PRIVATE USES OF EMINENT DOMAIN, 21 Yale J of L & Pol. Rev. 2 (2003), the majority of state courts have not adopted this procedure, continuing to use the broad purposive review of *Berman* and *Midkiff*. Contrary to several of the cases cited in the amici briefs, presumably as support for the use of heightened scrutiny, many of the state court decisions overturning a condemnation were not decided on higher scrutiny but either on rational basis or statutory grounds.

See, *e.g., City of Little Rock v. Raines*, 411 S.W. 2d 486, 493-94 (Ark. 1967) (finding that condemnation for creation of an industrial park was not authorized by state statute); *Daniels v. Area Plan Commission of Allen County,* 306 F.3d 445, 460 (4th Cir. 2002) (applying rational basis test but finding that state legislature had not made economic redevelopment a basis for eminent domain); *99 Cents Only Store v. Lancaster Redev. Agency,* 237 F. Supp.2d 1123 (C.D. Cal. 2001) (following *Midkiff*, but finding proposed condemnation was clearly egregious).

State and federal courts have proved extremely adept at preventing takings which were palpably without a rational basis. See, *e.g., 99 Cents Only Store; Aaron v. Target Corp.*, 269 F. Supp.2d 1162 (E.D. Mo. 2003) (finding that a temporary restraining order was appropriate because of bad faith acts by city and store) (overruled on *Younger* abstention grounds, 357 F.3d 768 (2004); *Casino Redev. Auth. v. Banin,* 727 A.2d 102, 111 (N.J. Super. Law Div. 1998) (finding that sole purpose of condemnation was to benefit Donald Trump: "any potential public benefit is overwhelmed by the private benefit received by Trump in the form of assemblage and future control over development and use of parcels of prime real estate in Atlantic City").

Many of the amici briefs supporting Petitioners, including the Professors' amicus brief, erroneously distinguish the Michigan Supreme Court's recent decision in *County of Wayne v. Hathcock,* 684 N.W.2d 765 (2004) from the Connecticut Supreme Court decision below, asserting that the "heightened scrutiny" test adopted by the Michigan courts in *Poletown Neighborhood Council* is the correct test. In fact, the Michigan Supreme Court in *Hathcock*, which overruled *Poletown Neighborhood Council*, did not

use the "heightened scrutiny" test in its analysis of public use. 684 N.W. 2d at 778. The "heightened scrutiny" tests applied by the various briefs and commentators, *i.e.* whether the public or private benefit is primary, whether there were alternatives, and whether there is clear and convincing evidence of public benefit, were not at issue in nor considered by the court in *Hathcock,* which decided the case entirely on state constitutional grounds.

This Court's decisions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) do not change the limited and deferential level of review to be applied in eminent domain cases where just compensation is afforded as a remedy. *Nollan* and *Dolan* involved uncompensated unconstitutional conditions attached to development approvals pursuant to regulatory exactions, not title to land through condemnation. Under such circumstances this Court held that higher scrutiny would be appropriate to establish that the required dedication was "roughly proportional" to the demands of the proposed use. *Dolan,* 512 U.S. at 391. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999), this Court made absolutely clear that the *Nollan/Dolan* test is limited to these special title exactions land use cases and does not apply to economic takings in which compensation is a remedy. 526 U.S. at 702. See *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997) ("[W]e believe that *Nollan-Lucas-Dolan* trio does not signal a change from this longstanding rule of deference because we see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.")

Adoption of heightened scrutiny in the instant case and in the review of questions under the "public use" clause would put a peculiar dichotomy in this Court's constitutional analyses under the Fifth Amendment. Since the early years of the last century, cases evaluating regulatory takings under the Fifth and Fourteenth Amendments have used the rational basis test to assess whether the regulation went "too far."

> Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property.

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981), *citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Inverse condemnation cases and direct eminent domain cases are *in pari materia*: they involve "a cause of action against a government . . . to recover the value of property which has been taken in fact by the government . . . " *United States v. Clarke*, 445 U.S. 253, 257 (1980), citing D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971). Thus, in eminent domain cases in which a state requires the property owner to be the plaintiff, rather than defendant, the federal courts will look to the true identity of the parties and allow the plaintiffs to remove to federal courts: "[t]he intent of the [condemnor] to get the land is the mainspring of the proceedings from beginning to end," *Mason City & Fort Dodge R.R. Co. v. Boynton*, 204 U.S. 570, 580 (1907); in

regulatory takings cases, the regulation is the "mainspring of the proceedings." Condemnation cases are simply the "reverse" of a regulatory/inverse condemnation case. *Clarke*, 445 U.S. at 257. The scrutiny by this Court is identical – rational basis.

For this Court to adopt heightened scrutiny in the case of physical takings under the Fifth Amendment, where compensation is paid to the landowner, but not in the case of regulatory takings, where no compensation is paid, would indeed be paradoxical. See *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 854 (9th Cir. 2004): "The Supreme Court reviews the challenged actions in [*Midkiff* and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987)] more deferentially because they involve physical takings."

The rational basis test remains the appropriate judicial standard for a determination of whether condemnation is for a public use. See dissent of Justice Rehnquist in *Keystone Bituminous Coal Ass'n*, 480 U.S. at 511, n. 3:

> When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.

(citing *Midkiff*; emphasis in original); *Nat'l R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 422-23 (1992) (applying the *Midkiff/Berman* test to a public use analysis).

B. TO THE EXTENT THE FIFTH AMENDMENT REQUIRES ANY STANDARD FOR PUBLIC USE IN THE CASE OF ECONOMIC DEVELOPMENT, REDEVELOPMENT OR REVITALIZATION, SUCH STANDARD IS ADEQUATELY MET BY ENSURING THAT THE GOVERNMENT CONDEMNOR RETAIN SOME LEVEL OF REGULATORY, CONTRACTUAL OR OWNERSHIP CONTROL OVER THE USE.

If this Court determines that it is necessary to clarify a standard on the scope of condemnation for economic development, redevelopment and/or revitalization purposes, such standard can be adequately accomplished by requiring that state and local governments retain public ownership or regulatory or contractual oversight or control over the future uses of the property. Under such a standard, state and local governments would retain broad discretion to provide for economic development while ensuring that the fundamental public nature of the benefit from the condemnation is maintained. Such a test would be consistent with state Supreme Court and lower federal court cases, and would ensure that there was no abject surrender to private use. This Court has long held that protection of economic prosperity is a valid goal of the police power. See *Chicago, Burlington v. Quincy R.R. Co.*, 200 U.S. at 592. Economic development and redevelopment are essential tools to ensure the viability and health of cities. A recent study of the impact of local government subsidiaries to industrial plants to locate within their jurisdictions demonstrates a net social and economic benefit for the local government. Greenstone & Moretti, BIDDING FOR INDUSTRIAL PLANTS: DOES WINNING A MILLION DOLLAR PLANT INCREASE WELFARE? National Bureau of

Economic Research, Nov. 2004. www.econ.ucla.edu/moretti/milliondollarplant.pdf.

The vast majority of state legislatures have determined that economic development is an important public purpose, which findings have been affirmed by the courts. As of 1996, "courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development assistance." *Macready v. City of Winston-Salem,* 467 S.E. 2d 615, 626 (N.C. 1996). Many states have recognized that economic development is a public use for which purpose a government's powers of eminent domain may be exercised. See, *e.g., Kaufmann's Carousel, Inc. v. City of Syracuse Indust. Development Agency,* 301 A.D. 2d 292 (N.Y. App. Div. 2002) (upholding condemnation of leasehold interests for shopping center expansion project that would promote job opportunities, general prosperity and the public welfare); *General Bldg. Contractors, L.L.C.* (authorizing condemnation for economic and industrial development purposes as a public use); *Prince George's County v. Collington Crossroads,* 339 A.2d 278, 289 (Md. 1975) (projects designed to "benefit the general public by significantly enhancing the economic growth of the State or its subdivisions" are a public use for which eminent domain can be used).

In *Hathcock*, the Michigan court held that such a condemnation of property is a public use *when the private entity remains accountable to the public in the use of that property* (emphasis added). 684 N.W. 2d at 781. Under this standard, the court reviews an asserted public use under rational deference to the legislative determination pursuant to the *Berman/Midkiff* analysis. Where the property is re-transferred to a private entity after condemnation, the

government is required to maintain some contractual, regulatory, or ownership control or oversight to ensure accountability of the continued public use, and, thus, pass public use constitutional muster. In the instant case, the Connecticut Court found that the City retained accountability and oversight because of the "contractual constraints in place to assure that private sector participants will adhere to the provisions of the development plan," which was to be in effect for thirty years. 842 A.2d at 545. Implementation and consistency with a comprehensive development plan has recently been determined to be a valid and important exercise of the police powers by this Court. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

1. Regulatory Control.

The continued government control and accountability in *Kelo* is starkly different from the lack of government oversight in *Southwestern Illinois Development Authority v. Nat'l City Environmental L.L.C.*, 768 N.E.2d 1 (Ill. 2002). SWIDA had condemned private property in order to convey it to the owner of a racetrack to permit such owner to expand the racetrack's private parking facilities. The condemnation was not undertaken as part of a redevelopment plan, and SWIDA had no authorized land use control; instead, once the property was condemned it was simply conveyed to the racetrack owner. There was no public oversight or control and the exercise of eminent domain did not result from SWIDA's "economic and planning process." *Id.* at 10. Thus, it was held to be a taking solely for a private purpose.

Many courts have already incorporated this regulatory control test in their analyses of public use claims. See *Condemnation of 110 Washington Street,* 767 A.2d 1154 (Pa. Commw. Ct. 2001) (where condemnor is stripped of all power of regulatory approval, even the power to determine whether and when the condemnation occurs, the condemnation is invalid); *Blanchard v. Dept. of Transportation*, 798 A.2d 1119 (Me. 2002) (condemnation for parking lot was a public use where town has retained regulatory control over the private operator and has right to assert control at any time); *Manufactured Housing Communities of Washington v. State of Washington,* 13 P.3d 183 (Wash. 2000) (statute which gave mobile home park tenants right of first refusal, and took away such right from owner, was a taking even though it would benefit members of the public, because it would vest private property rights in individual mobile park home owners, to the exclusion of all others where there was no regulatory governmental control); *Casino Redev. Authority,* 727 A.2d at 110-11 (there is no public use if the "when, how, and if the property is developed in the future will be outside the control of [the government] . . . ").

2. Ownership Control.

Secondly, many governments today enter into a myriad of projects with joint ownership of transit stations, master planned communities, and other transportation corridor centers to promote economic development with walkable neighborhood mixed residential and non-residential uses which promote reduction in air quality degradation due to fewer and shorter trips and corresponding health benefits. See Michael S. Bernick and Amy E. Freilich, TRANSIT VILLAGES AND TRANSIT BOARD DEVELOPMENT: THE RULES

ARE BECOMING MORE FLEXIBLE – HOW GOVERNMENT CAN WORK WITH THE PRIVATE SECTOR TO MAKE IT HAPPEN. 30 Urb. Law. 1 (1990). Similarly, government can preserve public use by requiring that affected landowners be authorized to participate in the project provided they comply with the adopted plan. *Huntington Park Redevelopment Agency v. Duncan*, 190 Cal. Rptr. 744 (Cal. App. 1983), *cert. denied*, 464 U.S. 895 (1983). See also *Township of West Orange v. 769 Associates, L.L.C.*, 800 A.2d 86 (N.J. 2002) (condemnation of property was for a public use where municipality retains ownership and the road remains open to the public).

3. Contractual Control.

Thirdly, contractual control over the project to ensure compliance with stated plan goals and objectives will insure public use. Such a principle is evident in the case of land use development agreements, entered into between a local government and a developer in connection with the proposed development of property. Development agreements, authorized by state law to protect the developer against subsequent changes in the law and to provide the city or county with assurance of compliance with plan goals and objectives, do not contract away a government's police power as long as the development agreement preserves the local government's ability to control the issuance of permits and to regulate land use, i.e., as long as the government does not surrender or abnegate a governmental function. *Santa Margarita Area Residents Together v. San Luis Obispo County*, 84 Cal. App. 4th 221, 232 (2002): *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 734 (1978).

CONCLUSION

Amici request this Court to retain the rational basis test for judicial review of public use for condemnations for economic development, redevelopment and revitalization of cities. Should the Court deem it necessary to provide a standard or guidance for such review, then the provision of regulatory, ownership or contractual control by the state or local governmental authority should suffice to meet Fifth Amendment public use requirements.

Respectfully submitted,

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